87-2107

No. 87-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

Lawrence J. Lewis, M.D., a Contributor to Anclote Psychiatric Center, Inc., a Florida Not For Profit Corporation,
Petitioner

v.

Anclote Manor Hospital, Inc., a Florida For Profit Corporation, Walter H. Wellborn, Jr., M.D., Arthur R. Lautz, Manual Valles, Jr., Robert L. Cromwell, Thomas C. Farrington, Jr., Thomas E. McLean, James C. Trezevant, Jr., Serge Bonanni, Lorraine Hibbs, Albert C. Jaslow, M.D., Robert J. Van de Wetering, M.D., Walter L. Cooper, James D. O'Donnell, and Jim Smith, Attorney General of the State of Florida,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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June 3, 1988

QUESTIONS PRESENTED

1. Whether a Contributor, Medical Director, and Director of Admissions of an Internal Revenue Code Section 501(c)(3) Charity, has standing to bring a derivative action on behalf of that Charity, when the State Court considering the issue ruled the Attorney General did not have standing to do so, leaving no one to represent the interests of the Charity in the face of blatant exploitation and profiteering by the Charity's Board of Directors, Respondents herein.

2. Whether the unadvertised and unnoticed purchase of an Internal Revenue Code Section 501(c)(3) Charity's assets by a for-profit corporation composed solely of the Directors of the Charity, and the subsequent resale of these same assets by the for-profit Corporation

within thirty months of the original sale, such that each Director received a personal profit in excess of $2.3 million, is sufficient to invoke the doctrine of *jus tertii* standing, thereby allowing a Contributor, Medical Director and Director of Admissions to sue on behalf of the Charity, that otherwise could only represent itself through the same Directors that defrauded it.

3. Whether, as a matter of public policy, a Contributor, Medical Director, and Director of Admissions of a Section 501(c)(3) charity should have recognized standing as a private Attorney General to represent the Charity when the Directors of the Charity have fraudulently misappropriated the assets of that Charity, and the Attorney General himself has been found not to have standing.

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner before this Court is Lawrence J. Lewis, M.D., who served as the Medical Director and Director of Admissions of Anclote Psychiatric Center, Inc., a non-profit charity tax exempt under Section 501(c)(3) (*see infra*, Appendix B) of the Internal Revenue Code. Respondent, Anclote Manor Hospital, Inc., is the for-profit entity owned by the twelve Board Members of Anclote Psychiatric Center, Inc., Respondents herein, that bought nearly all the assets of Anclote Psychiatric Center, Inc. in May 1983. Respondents, Walter H. Wellborn, Jr., M.D., Arthur R. Lautz, Manuel Valles, Jr., Robert L. Cromwell, Thomas C. Farrington, Jr., Thomas E. McLean, James C. Trezevant, Jr., Serge Bonanni, Lorraine Hibbs,

Albert C. Jaslow, M.D., Robert J. Van de Wetering, M.D., and Walter L. Cooper are the Board Members of Anclote Psychiatric Center, Inc., and stockholders of Anclote Manor Hospital, Inc. Respondent James D. O'Donnell is the attorney who first represented Anclote Psychiatric Center, Inc. during the initial planning stages of the transaction in which the Directors purchased Anclote Psychiatric Center's assets through Anclote Manor Hospital, Inc. O'Donnell later switched over and represented Anclote Manor Hospital, Inc., at the closing of this transaction. Respondent Jim Smith, who was at the time of the filing of the Complaint was the Attorney General of the State of Florida, was joined below as a Defendant, but has a unified interest with the Plaintiff to protect the interest of the Charity (*see infra*, Appendix A).

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DECISIONS BELOW

The Judgment and Opinion of the District Court for the Middle District of Florida, unreported, which holds that Petitioner does not have standing to represent the interests of the Charity, Anclote Psychiatric Center, Inc., is printed in Appendix A hereto, *see infra*, page 4a. The Judgment of the Court of Appeals for the Eleventh Circuit, also unreported, which affirmed the District Court, is printed in Appendix A hereto, *see infra*, page 13a. In a related case with the same operative facts filed in the State of Florida Circuit Court, Thirteenth Judicial Circuit, the Honorable J.C. Cheatwood held that the Attorney General of the State of Florida did not have standing to bring a

derivative action on behalf of the Charity. This State Court order, unreported, is printed in Appendix A hereto, *see infra*, page 15a.

JURISDICTION

The jurisdiction of the Supreme Court is invoked in this matter, pursuant to 28 U.S.C. §1254(1). Petitioner seeks review of the Order dated January 5, 1988, of the United States Court of Appeals for the Eleventh Circuit, *see infra* Appendix A, page 13a.

STATUTES INVOLVED

Pertinent provisions of 18 U.S.C. §§1961, Florida Statutes §617.09, and 26 U.S.C. §501(c)(3) are set out verbatim in Appendix B, *see infra* page 20a.

STATEMENT OF THE CASE

Background. Anclote Psychiatric Center, Inc. (hereinafter "APC"), a not-for-profit, charitable corporation, owned prior to May, 1983, a Hospital, two parcels of real estate and other assets with which to carry on the work of the Charity. In May, 1983, all twelve of the Directors of APC (Respondents herein) formed a separate for-profit corporation, Anclote Manor Hospital, Inc. (hereinafter "AMH"), of which they were sole shareholders. Using money the Directors borrowed from the Charity APC, and without obtaining bids from other purchasers, the for-profit corporation purchased the Charity's assets. Thirty months later, Respondent Directors sold the assets

formerly owned by APC to a third party, American Medical International, Inc. (hereinafter "AMI"), for over $29 million. By virtue of this transaction, each Director realized a personal gain of $2.3 million.

Factual History. Anclote Manor Hospital is a nationally-known psychiatric facility that specializes in long-term psychiatric care. Since the late 1950's, and prior to May 1983, the Hospital was owned and operated by a non-profit corporation, Anclote Psychiatric Center, Inc., which was tax-exempt under Internal Revenue Code Section 501(c)(3).

The Petitioner, Dr. Lewis, was Medical Director and Director of Admissions for the Hospital when it was owned by APC. He also served in this capacity

after May 1983 when Anclote Manor Hospital, Inc., operated the Hospital. Additionally, Dr. Lewis was a contributor to APC, having donated both money and property to the Charity.

According to its charter, APC was to be "organized and . . . operated exclusively for scientific, educational and charitable purposes." Its charter further provided that "no part of the net earnings shall inure to the benefit of any private stockholders or individuals." The Respondents, excepting O'Donnell and Smith, were at all times pertinent to this action, the sole Directors of APC.

In January, 1981, the twelve Respondent Directors retained Respondent O'Donnell, an attorney, to assist with the proposed sale of the assets of APC to

Respondent AMH, the for-profit corporation owned solely by the twelve Directors of APC. The Respondent Directors and O'Donnell hired an appraiser, selected by Respondent O'Donnell, who prepared, not an "appraisal," but a short form "Summary Valuation Report" of the Hospital owned by APC. The appraiser, Sheldrick, is now deceased. In correspondence with the appraiser, Respondent O'Donnell, who represented the APC Board at the time, indicated that "A range of $50,000 to $75,000 per bed is sometimes used as a replacement cost criteria for facilities within the psychiatric profession." Similarly, the "Summary Valuation Report" that the appraiser completed and submitted to the Directors of APC also stated that "A range of $50,000 to $75,000 per bed is sometimes used as

replacement cost criteria for facilities." The appraiser valued the Hospital as a 99 bed facility as of September 30, 1981, worth "in the lower area of a range of $3,500,000 to $4,300,000." Twenty months later, in May of 1983, when APC sold the Hospital to AMH, it was licensed as a 130 bed facility. Furthermore, AMH acquired not only the Hospital, but $1,268,318.62 in cash, $1,231,499.05 in treasury bills, $1,023,141.23 in accounts receivable, and two parcels of real estate which had been appraised by APC in 1981 and 1982 for $1,046,000.00. The Respondent Directors kept their intention to sell APC's assets to themselves a secret, and did not solicit any outside bids.1/ However, Affidavits of

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1/ The Respondent Directors claim that they obtained permission from the IRS to do the transaction. However, review of the relevant correspondence from the IRS cont.

expert Michael Schwartz and Thomas Usher obtained by the Attorney General in the State Court proceeding value the Hospital facility in May 1983, at between 12 to 20 million dollars.

In May 1983, the sale of APC's assets by the Respondent Directors to themselves as AMH, the for-profit corporation they owned, was completed. The purchase price was $6.3 million, substantially less than its actual value. The Directors borrowed $450,000 as a down payment from a local bank, borrowed $4.05 million from APC itself, and assumed $1.8 million of APC's liabilities (AMH acquired $1,268,318.62

1/ cont.
reveals that such permission was a ruling only as to the tax exempt status of the Charity, and such ruling was contingent, among other things, on an independent appraisal and independent legal advice, which were lacking according to the evidence. According to APC's minutes of February 3, 1983, the price was "set" prior to obtaining counsel to the Charity.

in cash immediately after its purchase of APC's assets with a down payment of only $450,000.00). The Respondent Directors consummated the sale without committing any personal out-of-pocket funds whatsoever, borrowing the Charity's own assets to put it out of the hospital business.

It was evident that there was an established market for the Hospital, because soon after the sale of APC's assets in 1983, the new entity, AMH, began receiving inquiries from potential purchasers of the Hospital. In October, 1985, the Hospital was sold by AMH to American Medical International (AMI), a large health care provider, for in excess of $29 million in cash.

Additionally, AMH divested itself of one of the real estate parcels not sold to AMI and originally owned by APC for

$375,000. In 1986, AMH was liquidated, and each Respondent Director received $2.3 million in cash, plus an undivided one-twelfth interest in the remaining lot.

Inasmuch as APC, speaking through the same Board of Directors that originally defrauded it, claims that the Charity was not damaged by these transactions, Petitioner Lewis seeks to derivatively assert APC's rights.

The Complaint. Petitioner Lawrence J. Lewis, M.D., a contributor who donated money and property to the charity, in addition to being Medical Director and Director of Admissions of the Hospital, claims that he and the Charity were in fact injured and seeks to have the personal gain that inured to the individual Directors returned to the

Charity. However, the Charity, through its Directors, claims that it was not damaged by this transaction.

Procedural History. After discovering that the Respondent Directors had realized a personal profit of great magnitude due solely to their positions as fiduciaries of a public charity, Petitioner Lewis notified Respondent Smith, as then-Florida Attorney General, on May 23, 1986, of the facts as described above, and requested that the Attorney General take action to enforce the Charity's charter, pursuant to Florida Statute §617.09 (1987) (*see infra*, Appendix B).

On May 30, 1986, the Complaint in the instant action was filed in the District Court of the Middle District of Florida, alleging that the Respondent Directors of

APC breached their fiduciary duties, committed fraud upon APC, violated the terms of the Charity's charter, and fraudulently used the mails and wires in violation of the RICO Act, 18 U.S.C. §§1961 (*see infra* Appendix B, page 22a). RICO is the basis of federal jurisdiction in this matter. Although the Respondents immediately challenged Petitioner's standing to bring this action, the District Court denied the Respondent's Motion to Dismiss on September 18, 1986, and discovery ensued (copy of Order *infra*, Appendix A, page 1a). On April 2, 1987, the Respondents filed a Motion for Summary Judgment, challenging Petitioner's standing, and the merits of the instant suit. Summary Judgment was granted for Respondents in an Order dated July 7, 1987. The District Judge found that Petitioner Lewis lacked standing to sue on behalf of

APC because Lewis had no "personal stake" in the matter. The District Court noted in its Order that the State Attorney General was investigating the situation, and cited Florida Jurisprudence for the proposition that the Attorney General would be the proper party to maintain an action on behalf of APC. (Order, *see infra* Appendix A). The merits of Lewis' lawsuit were never reached by the District Court.

On August 6, 1987, during the pendency of the appeal in the instant action, the Florida State Attorney General filed suit in state circuit court against the Respondents herein, based on the same nucleus of operative facts as described above.

On January 5, 1988, the Court of Appeals for the Eleventh Circuit affirmed the dismissal of the instant action by the District Court.

On March 8, 1988, the state Circuit Court held that the Attorney General of the State of Florida *also* lacked standing to bring a derivative action on behalf of APC, since the Attorney General was neither a stockholder in, nor a member of APC (copy of Order, *see infra* Appendix A).

Since the time to file a Petition for Writ of Certiorari was due to expire on April 4, 1988, Petitioner filed an Application of Extension of Time in which to file Petition for Writ of Certiorari on March 29, 1988, seeking an extension due to the inconsistent rulings on the issue of standing between the State and Federal Courts on these facts. The practical result of these decisions is that the only parties with standing to bring a derivative action on behalf of APC *are the twelve Respondent*

Directors, who each received $2.3 as a result of this transaction, but aver that APC has sustained no damage. The Application was granted by Justice Kennedy on March 28, 1988, extending the time to file this Petition to and including June 3, 1988.

REASONS FOR GRANTING THE WRIT

I. Public Policy Demands That Contributors to a Charity Should Have Standing to Bring Derivative Actions on Behalf of Charitable Corporations, Since the Potential for Abuse of the Charity's Assets by Unscrupulous Directors Is Great.

When the board of directors of a charity has arranged to divest the charity of its assets for purely personal gain, who is left to assert the rights of the charity, its donors, and ultimately, its beneficiaries? This question has been repeatedly posed by legal scholars. For example, one commentator observes:

> The case law governing the activities of directors in [charitable] organizations is almost nonexistent. . . .[T]he absence of judge-made law stems from the lack of practical enforcement devices and

> the deterrent effect of costly litigation on those who have no direct economic interest. The climate for charitable organizations is changing. Highly publicized cases of self-dealing and misapplication of charitable funds have created not only a public concern, but a public distrust.

Moody, *State Statutes Governing Directors of Charitable Corporations*, 18 U.S.F. L. Rev. 749, 750-51 (1984).

It has been further noted that, "The non-profit corporation, due to its nature and the liberality of the laws regulating it, is particularly susceptible to misuse by those having no scruples concerning illegality." Note, *Corporations - Illegal Activities By Non-Profit Corporations*, 8 Ark. L. Rev. 110, 112 (1953-54).

> The law generally relies on those who are most immediately interested in the property or enterprise administered by a fiduciary to call . . .enforcement machinery into action. Thus the beneficiaries of a

> public trust or the shareholders in a business corporation are in large measure expected to look out for themselves. One of the outstanding characteristics of a charity, however, is that there is no beneficiary in a comparable position who is sufficiently interested as an individual to call the charitable fiduciary to account.

Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 Harv. L. Rev. 433, 436 (1960).

Even with enforcement by the Attorney General, "there remains the possibility that all of a charity's fiduciaries will agree on a breach of duty. The public still needs outside watchdogs." *Id.* at 445. In Dr. Lewis' situation, with all twelve of APC's Directors having significantly benefitted from the transactions that harmed APC, public policy considerations demand that Lewis have standing to represent APC. The Directors should not

be able to reap a vast financial reward from a breach of their fiduciary duties, simply because of the limitations of a procedural rule.

II. Standing by a Contributor to a Charity Should Not be a Procedural Bar to an Otherwise Meritorious Action, Especially When Actual Damage Has Been Suffered by the Charity, and When Those Charged With the Legal Duty to Protect the Charity Are Themselves the Ones Who Have Damaged It.

Although the procedural rules that limit standing are practical, and necessary to the maintenance of an efficient system of justice, the rules themselves should never be paramount to the considerations of equity and justice. The law was never intended to

be so rigid, and logical innovations are possible when an already judge-made concept, such as standing, is reconsidered by the courts. *See Sierra Club v. Morton*, 405 U.S. 727, 755-56 (1972) (Blackmun, J., dissenting).

A. Standing: Two Requirements

Two requirements must be met before a person can be said to have standing to sue. First, he must have suffered an injury in fact; secondly, he must arguably be within the "zone of interest" of the law or constitutional provision challenged. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

The first requirement of "injury in fact" is taken from Article III of the Constitution, and the interpretation of

the "case or controversy" clause. The Supreme Court has held that this language means that some real and palpable injury must have been sustained in order to have standing to sue. *Warth v. Seldin*, 422 U.S. 490 (1975). The second requirement is the Court's self-imposed prudential limit which helps prevent deciding "abstract questions of wide public significance even though. . . judicial intervention may be unnecessary to protect individual rights." *Id.* at 500. Because this second limitation is judge-made, courts have felt some freedom to enlarge it. Additionally, a qualified exception has been found in conferring standing when one person stands in such a relationship with the injured party that he may be an effective advocate for the third party's rights, and when it is unlikely that the third party would sue

to vindicate his own rights. *Hoke Co., Inc., v. Tennessee Valley Authority*, 661 F. Supp. 740, 749 (1987).

B. Injury In Fact Requirement

The concept of standing has undergone considerable liberalization by the United States Supreme Court since the early 1970's. *See generally* Davis, *The Liberalized Law of Standing*, 37 U. of Chicago L. Rev. 450 (1970). An early case in this trend, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), refined the two elements needed by a plaintiff to have standing.

Data Processing dealt with the question of whether sellers of data processing services had standing to

challenge a ruling of the Comptroller of the Currency, which allowed national banks to provide data processing services. In interpreting prior Supreme Court decisions, both the district court and the court of appeals denied standing.

In reversing *Data Processing*, the Supreme Court quoted *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), whose holding limited the scope of standing by employing a new 'legal interest' test. The Court specifically rejected *Tennessee Electric*, instructing that "[t]he 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by

the complainant is arguably[2]/ within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. 153. The Court emphasized in a footnote that "the existence or nonexistence of a 'legal interest' is a matter quite distinct from the problem of standing." *Ibid.* With the Supreme Court holding in *Data Processing*, a large portion of the foundation of the law of standing prior to 1970 was broadened. The old test of "a recognized legal interest" was replaced with two new criteria. The Court in *Data Processing* found the old "injury in fact, economic or otherwise" test was satisfied by injury from new

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2/ The Supreme Court in *Data Processing* did not clarify the word "arguably." The word "arguably" implies a somewhat hypothetical standard, since almost any position can be arguable.

competition. 397 U.S. 157. The second test became "whether the interest sought to be protected by the complainant [was] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. 153.

Therefore, under *Data Processing*, Lewis must first demonstrate that there has been an injury in fact, and secondly, that the injury sustained is arguably within the zone of interests to be protected by statute, in this case, the anti-fraud provisions of RICO.

It has also been firmly established by the United States Supreme Court that the standing requirement of injury in fact is not met unless the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the

presentation of issues upon which the court so largely depends." *Baker v. Carr*, 369 U.S. 186, 204 (1962). That Dr. Lewis, so critically involved in the work of Anclote Psychiatric Center, has personally invested so heavily in this matter on the Charity's behalf, amply demonstrates an informed, concrete, and considerable interest in the outcome of this case.

The "personal stake" requirement is satisfied if the person seeking redress has suffered, or is threatened with, some "distinct and palpable injury," *Warth v. Seldin*, 422 U.S, at 501, and there must be some causal connection between the asserted injury and the conduct being challenged, *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976). Here, Lewis made a contribution which bought something the Charity

required in order to operate, e.g. a hospital bed. Subsequently, that same hospital bed was sold to AMI as part of AMH. Lewis' contribution, fraudulently appropriated by the Board, serves as the logical nexus between his status asserted (a Contributor) and the claim (the funds from his contribution having been misappropriated by the Directors). Some one entity must be permitted to redress this wrong, and Dr. Lewis is the only party available to do so.

To further analyze the extent of the injury in fact now before the Court, the instant matter should be distinguished from the landmark case of *Sierra Club v. Morton*, 405 U.S. 727 (1972), in which the plaintiff was held *not* to have standing. The Sierra Club brought suit to prevent Walt Disney Enterprises from developing a resort in the Sierra Nevada

Mountains, alleging the Sierra Club had standing because of its special interest in conservation and conservation's concomitant benefits. The majority opinion, by Justice Stewart, denied standing to the Sierra Club because it failed to allege any injury. The Court stated, "the "injury in fact" test . . . requires that the party seeking review be himself among the injured." *Id.* at 734.

The result in *Sierra Club* is readily distinguishable from this case. Lewis personally sustained damages in the loss of his contribution to APC, as well as was frustrated in his charitable intent to benefit APC rather than its directors; therefore, Lewis has more than an injury to a cognizable interest. Lewis can demonstrate a tangible loss as a result of Respondents' conduct in this case.

A particularly interesting facet of *Sierra Club* is the public policy consideration thoughtfully examined in the dissenting opinions. Justice Blackmun, in recognizing the unusual nature of the case, stated in his dissent:

> [T]his is not ordinary, run-of-the-mill litigation. The case poses -- if only we choose to acknowledge and reach them -- significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. ***Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?*** 405 U.S. at 755, 756 (Emphasis Added).

For Lewis, the narrow and mechanical principals of standing by district and appellate courts has, in effect, sidelined the justiciable issues in the

instant matter. Big charities have become big business, and as the facts of this matter amply demonstrate, big loopholes in the law persist to accommodate directing boards with a proactive desire to share the wealth.

The Supreme Court responded to the concerns expressed in *Sierra's* dissents four years later in *U.S. v. Student Challenging Regulatory Agency Procedures (SCRAP)* 412 U.S. 669 (1973), by embracing a broader standard with regard to standing, and exploring the parameters of the injury in fact test. The Court held that standing will not extend to "concerned bystanders," to use simply as a "vehicle for the vindication of value interests." *Id.* at 687. In *SCRAP*, a group of law students challenged an administrative regulation permitting railroads

to substantially increase shipping rates, by arguing to the Court that they had standing because they camped around the Washington, D.C. area, and the proposed cost increase in transporting by rail would result in a proliferation of roadside litter. The injury, as described by the Court, was as follows:

> Specifically, they claimed that the rate structure would discourage the use of "recyclable" materials, and promote the use of new raw materials that compete with scrap, thereby adversely affecting the environment by encouraging unwarranted mining, lumbering, and other extractive activities. The members of these environmental groups were allegedly forced to pay more for finished products, and their use of forests and streams was allegedly impaired because of unnecessary destruction of timber and extraction of raw materials, and the accumulation of otherwise recyclable solid and liquid waste materials. The railroads replied that since this was a general rate increase, recyclable materials would not be

> made any less competitive relative to other commodities, and that in the past general rate increases had not discouraged the movement of scrap materials. 412 U.S. at 676.

Indeed, the causal connection between law students who camp in the D.C. area, and rail rates expressed in *SCRAP*, was tenuous at best. But it was good enough to confer standing. By comparison, Lewis and the Charity were certainly more proximally injured by Lewis' contribution traveling through the Charity APC into the Directors' pockets. It is clear that, under the Supreme Court injury requirements, there must be an injury *and* a causal relationship between that injury and the case or controversy sought to be adjudicated. But considering the holding in the *SCRAP* case, it clearly seems that the injury does not have to register very high on the scale. The Supreme Court distinguished its earlier

Sierra Club decision from *SCRAP* by saying:

> In *Sierra Club*, . . .we went on to stress the importance of demonstrating that the party seeking review be himself among the injured, for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders. No such specific injury was alleged in *Sierra Club*. In that case the asserted harm "will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort," *id.*, at 735, 92 S. Ct. at 1366, yet "[t]he *Sierra Club* failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development." *Ibid.* Here, by contrast, the appellees claimed that the specific and allegedly illegal action of the Commission would ***directly harm them in their use of the natural resources of the Washington Metropolitan Area.*** 412 U.S. at 687. (Emphasis Added).

Applying the *SCRAP* rationale, Lewis has standing to bring this case because he was harmed by the misapplication of his charitable contribution, completely frustrating his reasons for contributing to the Charity's efforts *after the fact*. That Dr. Lewis' money and property were solicited for reasons ultimately different than initially implied, i.e., furthering the work of the Charity, constitutes direct harm, and confers upon him more than a general interest in the outcome of this case.

Even more specifically, while the "injury in fact" requirement is a strict one, the threshold in *SCRAP* is extremely low. The injury to the Plaintiff need only be characterized as an "identifiable trifle." *Id.* at 689. The Court said:

> We have allowed important interests to be vindicated by plaintiffs with no more

> at stake in the outcome of an action than a fraction of a vote, see *Baker v. Carr*, 369 U.S. 186: a $5 fine and costs, see *McGowan v. Maryland*, 366 U. S. 420; and a $1.50 poll tax, see *Harper v. Virginia Bd. of Elections*, 383 U. S. 663. . . . . The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; trifle is the basis for standing and the principle supplies the motivation. *Ibid.*

Dr. Lewis was harmed in that property belonging to the Charity to which he had contributed was converted by the Charity's Directors for personal profit. Petitioner's injury was not speculative (*Sierra*), and it more than meets the identifiable trifle standard (*SCRAP*). Injury occurred when the Directors of the Charity to which Lewis contributed, and by which Lewis was employed, sold the Charity's assets for individual gain, in the face of their appointment to oversee

the Charity's protection and proper guidance. The Articles of Incorporation of the Charity states that "no income or assets shall inure to the benefit of any private individual or shareholder." Clearly, Dr. Lewis has demonstrated his commitment to the protection of the Charity APC, whose Articles of Incorporation were greedily violated by all twelve Directors. Under *Sierra* and *SCRAP*, Dr. Lewis is in a position to do so.

C. The Zone of Interest Requirement

The next requirement for standing is that the claimant must "arguably" be within the "zone of interest" protected by the statute or constitutional provision at issue. This rule is grounded in the concept that one may not claim

standing to vindicate the constitutional rights of some third party. *Barrows v. Jackson*, 346 U. S. 249 (1953).

While the minimum injury in fact requirement of Article III was construed to be an "identifiable trifle" in *SCRAP*, and that definition runs through many of the cases, there is no clearly defined test to determine in what position a litigant must be before he is within the "zone of interest" protected by statute or constitutional provision. The Court has said the question is whether the statute or constitutional provision on which the claim rests "properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. at 500. "In some circumstances, countervailing considera-

tions may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties." *Id.* at 500-501. Lewis' case is one such circumstance; like *Warth v. Seldin*, the doctrine of *jus tertii* standing plainly applies to this case.

III. A Contributor to a Charity Has Such a Relationship With the Charity as to Meet the Caselaw Requirements of *Jus Tertii* Standing When the Charity, as Real Party in Interest, is Unable to Maintain an Action in Its Own Right.

It is generally held that a plaintiff must assert his own legal rights, thereby precluding standing of a party seeking

relief on behalf of a third party. However, an exception to the general rule is *jus tertii* standing.

> Where practical obstacles prevent a party from asserting rights on behalf of itself, for example, the Court has recognized the doctrine of *jus tertii* standing. In such a situation, the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)(plurality)(*citing Craig v. Boren*, 429 U.S. 190, 193-94 (1976)).

The general rule that one may not claim standing to defend the rights of a third party, "[l]ike any general rule . . . should not be applied where its underlying justifications are absent."

Singleton v. Wulff, 428 U.S. 106, 114 (1976) (plurality).

In *Singleton*, two Missouri doctors sued on behalf of their Medicaid patients to extend Medicaid coverage to include elective abortions. The Supreme Court conferred third party standing on the physicians, holding that a woman eligible for Medicaid had sufficient obstacles to prevent the assertion of her own rights (including privacy and poverty), and that the physicians were uniquely qualified, by virtue of their relationship with their patients, to litigate the State's interference with abortion decisions. The Court, in deciding whether to abrogate the general rule, further defined the standard of injury in fact, isolating three factors. First, the relationship between the third party and the party asserting the third party's

rights must be such that "the former is fully, or very nearly, as effective a proponent of the right as the latter." *Id.* at 115. Second, there must be a genuine obstacle to the third party's assertion of his own rights. *Id.* at 115-16. Third, the Court scrutinizes the "*ability* of the third party to assert his own right." *Ibid.*

Hoke Co. v. Tennessee Valley Authority, 661 F. Supp. 740, 749 (W.D.Ky. 1987) further explores the genuine obstacle test, noting:

> What constitutes a 'genuine obstacle' to a third party's suit is not entirely clear. . . .A third party faces a genuine obstacle to the assertion of his right if by litigating the issue, the third party would vitiate or chill the right he seeks to protect. . .Another genuine obstacle to the assertion of a third party's rights is the problem of mootness. . . Still another genuine obstacle is found where the injured third party is

> contractually, or procedurally excluded from bringing suit." *Ibid.*

Additionally, the general rule that a party cannot assert the rights of third parties "is a salutary rule." *Barrows v. Jackson*, 346 U.S. 249, 257 (1953). In *Barrows*, a Caucasian woman who failed to honor a covenant restricting sale of her property to other Caucasians only, was allowed to assert the rights of non-Caucasians, even though none appeared before the Court, because the Court felt that it needed to "protect fundamental rights which would be denied by permitting the damages action to be maintained." *Id.* at 1035. *Barrows* establishes that the **uniqueness of the underlying situation is itself a factor** in the decision to confer *jus tertii* standing, and adds judicial discretion to the equation.

Finally, in *Craig v. Boren*, 429 U.S. 190 (1976), (plurality), the Court ruled that a seller of beer had standing to assert the rights of her customer, who was being discriminated against on the basis of his age. The Court reasserted the situational relevance in questions of *jus tertii* standing, saying this Court's "decisions have settled that limitations on a litigant's assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary 'rule of selfrestraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." 429 U.S. at 193.

The instant matter closely mirrors the precedent established in Supreme Court decisions on third party standing. Certainly APC faces a "genuine obstacle"

in bringing suit against its own Directors, since a charitable corporation "typically . . .has neither members nor shareholders to whom directors are accountable." Moody, *State Statutes Governing Directors of Charitable Corporations*, 18 U.S.F. L.Rev. 749, 749 (1984). APC's only voice is through its twelve Directors; even the Attorney General of the State of Florida has been held to be not with standing to bring a derivative action on behalf of APC. (*See infra.*, Appendix A). Since the State Court has curtailed the activity of the Attorney General's office with respect to bringing a derivative claim on behalf of APC, and since it is the twelve Respondent Directors who have damaged APC, the ability of APC to assert its own rights is virtually nonexistent.

APC stands mute and impotent to defend itself, while the Charity's very Directors, obligated at all times to act in a fiduciary manner, claim in the Record of this case below that APC has not been damaged.

Moreover, as a contributor, Medical Director and Director of Admissions, Dr. Lewis can himself demonstrate an injury in fact and is uniquely qualified, by virtue of his long-standing personal and professional relationships with APC, AMH, and its Directors, to vigorously assert APC's rights. The situation here, a charity defrauded by its own Board, and further denied the protection of the Attorney General's office, the only public entity charged with the Charity's welfare, presents a classic conundrum at best.

The doctrine of *jus tertii* standing is the only practical and fair path to a solution, and is accurately and easily applied under these circumstances.

IV. Restrictions on Third Party Standing Should Not Bar an Otherwise Meritorious Claim.

There is a growing body of literature supporting the proposition that standing requirements are being misused. These commentators believe the courts should reach all cases that require resolution, without respect to confusing and often unsubstantial procedural bars. This is especially true with the doctrine of third party standing.

"As long as there is no conflict between a litigant's interest and that which he seeks to represent, there is no reason why his unprotected interest should disqualify him. His interest makes him an effective advocate for protected third parties." Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 471 (1974).

"The Court's confused pronouncements on the third party standing issue has resulted in unnecessary litigation preliminary to ever reaching the merits and -- to the extent that the Court has created pitfalls for those seeking third party standing -- its conclusions in this area conflict with the general loosening of procedural burdens in cases involving personal standing. Assuming that the

litigant has suffered injury in fact from the challenged conduct; that the case is sufficiently concrete and ripe; and that prudential concerns do not dictate judicial self restraint, the Court should only forbid third party standing if it is persuaded that the party seeking standing will not be an adequate representative of the third parties whose interest he champions." Nowak, Rotunda and Young, *Constitutional Law*, §2.12 (3d Ed. 1986).

"The Supreme Court has never offered adequate justification for the rule against third-party standing in federal courts. . . In addition, this 'prudential' limitation on the standing of litigants who clearly satisfy the requirements of Article III conflicts with the liberality of the Court's decisions in the area of mootness."

Rohr, *Fighting for the Rights of Others: The Troubled Law of Third Party Standing and Mootness in the Federal Courts*, 35 U. Miami L. Rev. 393, 462 (1981).

Many believe the rules regarding third party standing are merely being used to reach some cases and not others. In meritorious cases the Court finds standing; in cases without merit it does not.

"One who tries to find a rational explanation for the contrariety of holdings is driven to the question whether the motivation for the holdings on standing lies in the Court's inclination to disinclination to decide particular substantive issues." K. Davis, *Administrative Law in the Seventies* §22.06 at 518-19 (1976).

Many commentators are perplexed by the array of tests and sub-tests the Court has built in order to reach the correct conclusion, and support abandoning these tests in favor of simpler criteria.

"In spite of the Court's attempts to set up tests to determine when the *Barrows* justification will allow third party standing and when it will not, no consistent rationale explains the case law." Nowak, Rotunda and Young, *Supra*, at 83.

"The Supreme Court frequently has recited the rule that 'ordinarily, one may not claim standing in this court to vindicate the rights of some third party.' Yet the Court has created numerous exceptions which lack a coherent pattern and leave the significance of the

rule in doubt." Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974).

One commentator believes it is misguided to think that if rules on standing were thrown out, crowds would gather at the courthouse door. "It is not possible to determine how often *jus tertii* arises in statutory review or might arise if endorsed. But the fear of crowds that is sometimes invoked against relaxation of standing doctrine seems chimerical; the mass of irresponsible litigants which haunts some older opinions and government briefs has not been found in the courtroom." Albert, *supra*, at 471.

Petitioner Lewis' claim against the Directors of APC is well-grounded in the fact that they took advantage of their status to the detriment of the charitable

corporation to which they owed a fiduciary duty. The Directors should be called to account for the breach of that duty, and public policy requires that the Directors should not anticipate escaping that accounting by the mechanistic application of a procedural rule.

There is a well-documented need to recognize the standing of other interested parties in actions on behalf of charities. Charitable beneficiaries, employees and co-directors are beginning to have such recognized standing. Moody, *State Statutes Governing Directors of Charitable Corporations*, 18 U.S.F. L. Rev. 749, 749-50 (1984). In this case, since Dr. Lewis was both a contributor and an employee of APC, he has an interest in the Charity and he should have standing to pursue this action on APC's behalf.

Although it is generally recognized that a state Attorney General should have standing to sue to enforce the terms of a charitable corporation's charter, in Lewis' case, this has been held not be be true (*See infra*, Appendix A). However, even if it had been held that the Florida State Attorney General had standing to represent APC, this in itself should not preclude private actions on a charity's behalf. First, most state attorneys general have neither adequate staffing, nor an adequate budget to sufficiently meet this responsibility. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 Harv. L. Rev. 433, 449-452 (1960). Secondly, attorneys general usually have only limited access to information concerning the day-to-day decision making of charitable Directors or Trustees.

Berry & Buchwald, *Enforcement of College Trustees' Fiduciary Duties: Students and the Problem of Standing*, 9 U.S.F. L. Rev. 1, 24-25 (1974).

"The extension of standing to private interested persons, while attorney general supervision of charitable trusts remains inadequate, is analogous to the recognized power of co-trustees to initiate action where attorney general supervision is lacking. It is also consonant with the growing acceptance of 'private attorneys general' to vindicate the public interest in environmental actions." *Id.* at 29-30.

"The mere existence of such financial power creates a much greater likelihood for trustee misconduct . . . The potential for misconduct is compounded by the vacuum in university governance left

in the decline of formal church controls. The right of trustees to fill their own vacancies is one provision which has been retained in many corporate university charters." *Id.* at 13.

In Lewis' case, the trial court's dismissal order suggested that the Attorney General should be the proper party to bring an action against the twelve Respondent Directors. The appellate court's Summary Affirmance suggests its agreement. However, it has now been held that the Attorney General, in fact, does *not* have derivative standing to represent APC in this matter. Therefore, the need to recognize Dr. Lewis as having the standing of a private attorney general, is, as a matter of public policy, great, especially when the potential for abuse of the Charity by its

Board of Directors has already been fully realized.

V. A Contributor, Medical Director, and Director of Admissions of a Charitable Psychiatric Center Possesses a Sufficiently "Special Interest" in the Enforcement of the Terms of The Charitable Corporation's Charter That He Should Have Standing.

A contributor who alleges no special interest other than having made a contribution, and who alleges no fraud or bad faith on the part of a charitable corporation's directors, has been denied standing because "the Attorney General is usually the proper party to represent the public's interest." *Holden Hospital Corp. v. Southern Illinois Hospital Corp.*, 174 N.E.2d 793 (1961). However,

"a party alleging a special interest, an interest beyond that general interest possessed by the public at large, has standing to bring suit [to enforce the terms of a charitable trust]." *State of Delaware v. Florida First National Bank*, 381 So.2d 1075, 1077-78 (Fla. App. 1979).

For example, in *Gray v. St. Matthews Cathedral Endowment Fund*, 544 S.W.2d 488 *writ ref. n.r.e.* (Tex. Civ. App. 1976), it was held that a plaintiff may have standing to sue on behalf of a charitable corporation if he asserts "*an interest different from that of the public at large* [Emphasis in original]," and not different from the interest of other parishioners. *Gray*, 544 S.W.2d at 491.

It has also been held that the interests of college students, staff, and faculty as beneficiaries in the financing of an educational institution constituted

a sufficiently special interest such that they had standing to sue the institution's president and board of directors for misuse of federal and church funds. *Jones v. Grant*, 344 So.2d 1210 (Ala. 1977). Dr. Lewis clearly has a special interest in enforcing the terms of APC's Charter. His interest as Medical Director, Director of Admissions, and Contributor is sufficiently different from the interest of the public at large that this Court should recognize his standing as a third party to vindicate the blatant and egregious wrong dealt APC.

VI. Dr. Lewis, as a Person Seeking to Institute a Derivative Action on the Charity's Behalf, Should Have Nothing More to Prove Than a Special Interest, and an Injury in Fact to the Charity.

"In a conventional corporation, the duties of care and loyalty are owed to the shareholders. For violations of these fiduciary duties, the shareholders may sue directors derivatively on behalf of the corporation for damages or injunctive relief. A shareholder may also bring a suit directly for damages he suffers as a result of officer or director action. Thus, in the corporate model a remedial procedure is provided by which members of the corporation may hold directors to their fiduciary standards. Clearly this remedial procedure is nonexistent in the private university [or charitable] corporation. . . Traditionally, no one stands in the same position as the corporate shareholder." Berry and Buchwald, *Enforcement of College Trustees' Fiduciary Duties: Students and*

the Problem of Standing, 9 U.S.F. L. Rev. 1, 15 (1974).

CONCLUSION

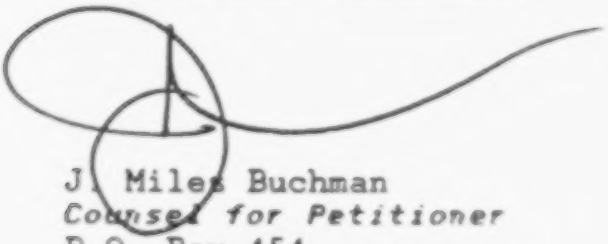
The District Court assumed in its Order that the Attorney General would be able to litigate the merits in State Court. The Eleventh Circuit affirmed for the same reasons. Subsequently, the State Court considering the case ruled that the Attorney General could not assert derivative rights on behalf of APC. Practical problems in reaching the merits of this case obviously exist. But Lewis' position, like the bartender who represents his customer, the Caucasian seller who represents the Black buyer, and the physicians who represent their patients, seeks to insure that the spirit and interest of policies instituted for

the public weal are maintained. Procedural guidelines for standing were never intended to be used as a bar to the proper implementation of public policy, in order that self-interested Directors may unjustly profit.

Since all twelve of APC's Directors conspired to relieve APC of its assets, their claim that the Charity sustained no damage rings hollow, indeed. If APC's Directors will not defend the Charity they deliberately eviscerated, Justice requires that Dr. Lewis' standing to defend the Charity be recognized. An injury of this magnitude to this Charity should not go unredressed.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



J. Miles Buchman
Counsel for Petitioner
P.O. Box 454
Tampa, Florida 33601
(813) 229-9286

June 3, 1988

Certificate of Service

I hereby certify that in accordance with Rule 12.3 and Rule 28.5 of this Court, forty (40) copies of this Petition was deposited in the U.S. Mail, addressed to the Clerk of the United States Supreme Court, and three (3) true copies of the foregoing have been furnished by mail delivery to John R. Bush, Esq., 220 S. Franklin Street, Tampa, Florida 33602; Edward M. Booth, Esq., 2508 Gulf Life Tower, Jacksonville, Florida 32207; Attorneys for Defendants (except Smith), Tony Cunningham, Esq., 708 Jackson Street, Tampa, Florida 33602; additional Counsel of Record for Defendant Robert L. Cromwell, and upon Counsel for Attorney General Smith, Gerald B. Curington, Esq., Chief, General Civil Litigation, Department of Legal Affairs, The Capitol,

Suite 1501, Tallahassee, Florida

32301-8048; this 3rd day of June, 1988.

J. Miles Buchman
Counsel for Petitioner

Subscribed and sworn to before me on
June 3rd, 1988.

Notary Public
State of Florida at Large
My Commission Expires: 11-14-88

- APPENDICES -

APPENDIX A

OPINIONS BELOW

Order of September 17, 1986 Denying

Defendants' Motion to Dismiss

IN THE UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

Civil Action No. 86-654-Civ-T-13(c)

LAWRENCE J. LEWIS, M.D., a contributor to ANCLOTE PSYCHIATRIC CENTER, INC., a Florida Not For Profit Corporation,

Plaintiff

vs.

ANCLOTE MANOR HOSPITAL, INC., etc., et al.,

Defendants

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This cause comes before the Court upon a motion to dismiss and for judgment on the pleadings filed by all defendants except the Attorney General for the State of Florida. It is well established that "a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any state of facts that could be proved in support of his claim." *Cook & Nichol, Inc. v. The Plimsoll Club*, 451 F.2d 505, 506 (5th Cir. 1971). *Accord, Conley v. Gibson*, 355 U.S. 41 (1957). Accordingly, the motion is DENIED.

DONE AND ORDERED in Chambers at Tampa, Florida, this 17th day of September, 1986.

/s/ George C. Carr

UNITED STATES DISTRICT JUDGE

Order of July 7, 1987 Granting
Defendants' Motion for Summary Judgment

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Civil Action No. 86-654-Civ-T-13(c)

LAWRENCE J. LEWIS, M.D., a contributor to ANCLOTE PSYCHIATRIC CENTER, INC., a Florida Not For Profit Corporation,

Plaintiff

vs.

ANCLOTE MANOR HOSPITAL, INC., etc., et al.,

Defendants

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This cause comes before the Court upon the defendants' (except Jim Smith, who was Florida's Attorney General at the time this action was filed, hereinafter "Smith") motion for summary judgment. In the motion, the defendants (except Smith) contend that there is no genuine issue of material fact as to the plaintiff's allegations of fraud and that the plaintiff lacks standing to sue. As the Court finds that the plaintiff does not have standing, this case is DISMISSED on jurisdictional grounds without a determination on the merits of the substantive claims asserted in the complaint.

In essence, the complaint alleges that the defendants (except Smith), as directors and attorney for Anclote Psychiatric Center, Inc. ("APC"), illegally converted

APC's not-for-profit status to a for-profit corporation and otherwise breached their fiduciary duty and committed fraud upon APC by selling APC's assets at less than fair market value to Anclote Manor Hospital, Inc. ("AMH"), which was controlled by the defendants, and then reselling the assets for a huge profit to American Medical International, in violation of APC's charter and 18 U.S.C. §1961, *et seq.* ("RICO"), as well as pendent state laws. The complaint states that plaintiff Lawrence J. Lewis "is bringing this derivative action on behalf of [APC], and has standing to do so." (Complaint at 9). Lewis maintains that he is not pursuing this action in his own right but is acting as a representative of APC. He bases his standing upon his charitable contributions to APC and upon his employment as a

medical director and director of admissions of APC. (Memorandum in support of complaint at 3). The complaint also contains allegations against Florida's Attorney General (Smith) and states that Lewis tendered the requisite §100 [sic] fee to the Florida Department of Legal Affairs but Smith failed to institute any action against the defendants (except Smith) as required by Florida Statutes section 617.09.

The contributions upon which Lewis bases his standing were made in 1979 and consisted of $100 in cash plus an automobile for which he paid $200. The IRS has not disallowed Lewis' charitable deductions based upon those contributions within the three year statute of limitations set forth in 26 U.S.C. §6501(a), and Lewis has otherwise been unable to calculate any damages that he has personally

suffered from the actions of APC's board of directors. In other words, the plaintiff has failed to show a "personal stake" in this action. *See Flast v. Cohen*, 392 U.S. 83, 99 (1968)(focus on person who's standing is challenged, not whether issue is justiciable).1/ *See also* 18 U.S.C. §1964(c)(limits civil RICO action to person *"injured in his business or property"* (emphasis added)).

Lewis further asserts that his position as medical director and director of admissions of APC gives him a special interest in this case. However, Lewis was

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1/ Although the plaintiff relies on *Gray v. St. Matthews Cathedral*, 544 S.W.2d 488 (Tex. Civ. App. 1976), in support of standing, the plaintiff in *Gray* had a definite "personal stake" in the outcome because he was a former member of the vestry who remained contingently liable for church debts and who was a successor trustee of the trust involved. No such personal stake is involved in the case at bar and *Gray* is otherwise inapposite.

only an employee of APC and has never been on the board of directors or a member of APC, nor has he ever owned stock in APC. *See Fla. Stat.* §617.50(5)(definition of "member"); *cf. Fla. Stat.* §617.022 (ultra vires -- actions by members or directors); *see also Fla. Stat.* §617.011 (corporations for profit shall not issue stock). Both Federal and Florida law require that a plaintiff in a derivative action either be a shareholder or member of the corporation at the time of the transaction of which he complains or that such share or membership thereafter be devolved upon him by operation of law. *See* Fed.R.Civ.P. 23.1; *Fla. Stat.* §607.147. The plaintiff argues that such requirements are inapplicable to him because they are "merely rule[s] of procedure in 'membership' and 'shareholder' derivative actions, which this

case is not." (Plaintiff's memorandum in support of complaint at 4 n.3). As noted, however, paragraph nine (9) of the complaint states that Lewis "is bringing this derivative action on behalf of [APC] . . . ." Lewis' inability to bring an action under the rules for derivative actions reaffirms this Court's earlier determination -- the plaintiff has no personal stake in the outcome of this action.

The plaintiff argues that to deny him standing "would create the absurd result . . .that there would be no legal mechanism to bring a representative suit on behalf of the Charity [and that] [a]s a matter of public policy, some individual plaintiff must have the right to protect the interests of a charity if those legally charged to do so fall short of their

responsibilities." However, a mechanism for such relief has been provided by Florida law. *See Fla. Stat.* §617.09; *see also* 9 Fla. Jur.2d *Charities* §18 (Attorney General is proper party and private parties generally have no right to maintain suit other than as relators to Attorney General). In addition, given the Attorney General's response to the defendants' (except Smith) motion for summary judgment, the plaintiff's concerns that the interests of the charity will not be protected are unfounded. Therein, the Attorney General asserts that he is still investigating and evaluating the evidence and is authorized under both common-law and statutory law to investigate, and if necessary, litigate the alegations [sic] contained in the complaint.

Accordingly, this action is DISMISSED.

DONE AND ORDERED in Chambers at Tampa, Florida, this 7th day of July, 1987.

/s/ George C. Carr

UNITED STATES DISTRICT JUDGE

Opinion of the United States Court of Appeals for the Eleventh Circuit

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87-3563

LAWRENCE J. LEWIS, M.D., a contributor to Anclote Psychiatric Center, Inc., a Florida Not For Profit Corporation,

Plaintiff-Appellant

versus

ANCLOTE MANOR HOSPITAL, a Florida For Profit Corporation, WALTER H. WELLBORN, JR., et al.,

Defendants-Appellees

and

ROBERT A. BUTTERWORTH, Attorney

General of the State of Florida

Defendant

Appeal from the United States District Court for the Middle District of Florida

---

(January 5, 1988)

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

PER CURIAM:

We affirm the judgment of the district court for the reasons set forth in its dispositive order of July 7, 1987.

AFFIRMED.

State Court Order of March 8, 1988 holding that State Attorney General does not have standing to sue in a derivative action on behalf of Anclote Psychiatric Center, Inc.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY, CIVIL DIVISION

Civil Action No. 87-14147

STATE OF FLORIDA, ex rel. ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, on behalf of ANCLOTE PSYCHIATRIC CENTER, INC., and the CITIZENS OF THE STATE OF FLORIDA,

Plaintiff

vs.

ANCLOTE MANOR HOSPITAL, INC., a For-Profit Florida Corporation; WALTER H. WELLBORN, JR., M.D.; ARTHUR R. LAUTZ; MANUEL VALLES, JR.; ROBERT L. CROMWELL; THOMAS C. FARRINGTON, JR.; THOMAS E. McLEAN; JAMES C. TREZEVANT, JR.; SERGE BONANNI; LORRAINE HIBBS; ALBERT C. JASLOW, M.D.; ROBERT J. VAN de WETERING, M.D.; WALTER L. COOPER; individually and as DIRECTORS OF ANCLOTE PSYCHIATRIC CENTER, INC., A Not-For-Profit Florida Corporation, and ANCLOTE MANOR HOSPITAL, INC.; and ANCLOTE PSYCHIATRIC CENTER, INC.,

Defendants

ORDER GRANTING DEFENDANTS' MOTION TO STRIKE DEMAND FOR JURY TRIAL

This cause came before the court on Defendants' Motion to Strike Plaintiff's

Demand for Jury Trial. The court heard argument of counsel, considered the legal memorandum submitted and reviewed the First Amended Complaint.

As previously ruled by the court on January 27, 1988, the Attorney General has standing to bring this action under 617.09 Fla. Stat. (1984) based upon the allegations of the First Amended Complaint. However, the court has now determined that the Attorney General does not have standing to sue in a derivative action on behalf of Anclote Psychiatric Center, Inc., because he was not a member or stockholder of the corporation (607.147 Fla. Stat. 1984) at the time of the acts complained of.

The First Amended Complaint does allege that the defendant directors' conduct was inconsistent with the pur-

poses stated in the articles of incorporation, thereby invoking the Attorney General's standing to sue under 617.09 Fla. Stat. (1984), and paragraph i of the prayer for relief asks for relief appropriate should the court find a violation of said statute.

It is thereupon;

ADJUDGED and ORDERED that plaintiffs' prayers for relief which are of a derivative nature are stricken. It is further;

ADJUDGED and ORDERED that plaintiffs' request for a jury trial is sticken [sic] and upon counsel advising the court of the expected length of the trial, a non-jury trial will be scheduled.

DONE and ORDERED at Tampa, Hillsborough County, Florida, this 8th day of March, 1988.

/s/ J.C. Cheatwood

CIRCUIT JUDGE

Copies furnished to:

Gerald B. Curington, Esquire

John R. Bush, Esquire

Edward M. Booth, Esquire

Tony Cunningham, Esquire

Paul Antinori, Esquire

Robert V. Williams, Esquire

J. Miles Buchman, Esquire

APPENDIX B

1. RELEVANT RICO ACT PROVISIONS.

18 U.S.C. §1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or

authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. §1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. §1961(1). Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one

year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511

(relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2341-2346 (relating to trafficking in contraband cigarettes), section 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to

embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

18 U.S.C. §1961(5).

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. §1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or

participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in

or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. §1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

2. 26 U.S.C. §501(c)(3)(Internal Revenue Code).

§501(c)(3). Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports

competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which insures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

3. FLA. STAT. §617.09 (1987).

§617.09 Fla. Stat. (1987)

§617.09 Proceedings to revoke articles of incorporation or charter or prevent its use. -- In the event any member or citizen shall complain to the Department of Legal Affairs that any corporation organized under this chapter was organized or is being used as a cover to evade any of the laws against crime, or for purposes inconsistent with those stated in its articles of incorporation or charter, and shall submit prima facie evidence to sustain such charge, together with sufficient money to cover court costs and expenses, the said department forthwith shall institute and in due course prosecute to final judgment such legal or equitable proceedings as may be considered advisable either to revoke the articles of incorporation or charter or prevent its improper use.